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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

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COMMENTS OF AT&T CORP. ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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COMMENTS OF AT&T CORP.

Pursuant to the Commission's *Notice*,[1] AT&T Corp. ("AT&T") hereby submits its comments in this proceeding on remand from *AT&T Corp.* v. *Iowa Utils. Board.*

INTRODUCTION AND SUMMARY

The issue that the Supreme Court has remanded to the Commission is a narrow one. Although it otherwise upheld the *First Report and Order*,[2] the Court concluded that the Commission had not provided an adequate explanation for Rule 51.319's requirements that incumbent LECs provide access to seven particular network elements. The Court held that the *First Report and Order* had not made the two findings necessary to support its determination that

[1] Second Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. April 16, 1999) ("*Notice*").

[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("*First Report and Order*").

the LECs' denial of access to one or more of these elements would "impair" the "ability" of new entrants to provide service within the meaning of § 251(d)(2).[3] Nor had the *First Report and Order* set forth any other "rational basis" for the rule that "tak[es] into account the objectives of the Act."[4]

These deficiencies can be cured forthwith. Most starkly, the Commission can make the two findings that were not expressly made in 1996, but that will establish that the unavailability of each element from the LEC would impair the ability of new entrants to provide services. These findings were compelled by the record that was before the Commission in 1996, and they are, in all events, equally required by the conditions in today's local telephone markets. Beyond that, the Commission's intervening orders in its § 271, access charge reform, and other proceedings vividly demonstrate that access to combinations of up to all of these seven elements at cost-based rates is essential if the Act's objectives are to be met. That will allow the immediate development of mass market competition for exchange and exchange access services if and when the incumbent LECs make these elements available. That will also accelerate the construction and deployment of alternatives to LEC networks whenever and wherever they are economically and technically feasible.

Notably, the only reason these benefits have yet to be realized is that the incumbent LECs have successfully used litigation and related tactics to delay and burden the availability of

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[3] *See AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721, 734-736 (1999).

[4] *See id.* at 736.

combinations of network elements. The LECs blocked the implementation of critical rules for three years through the substantive and jurisdictional challenges that the Supreme Court has now rejected. The incumbent LECs further imposed massive additional delays, costs, and entry barriers by refusing to implement other requirements until a vast array of subsidiary "issues" were negotiated and litigated in state arbitration and federal district court review proceedings.

In the same vein, the incumbent monopolists are seeking to use this narrow remand proceeding to delay, frustrate, or altogether preclude the development of mass market competition through LEC network elements. Although the Supreme Court has vacated only Rule 51.319 and directed only that the Commission's reconsider "*which* network elements must be made available,"[5] the LECs are asking the Commission to reopen a number of other requirements of the *First Report and Order* that were not challenged or that were specifically upheld in the prior appeals. They are even asking the Commission to vacate the requirement that its minimum set of elements be available nationally and to adopt, instead, a rule in which access is required only in those states where the state commission has determined that a particular carrier needs access to a particular element to provide particular services to particular customers in particular areas. That rule would radically increase the costs of unbundled network elements, deprive CLECs of the certainty essential to the offering of competitive mass market services, and cause massive further delays in the availability of network elements.

Five points are central to this remand proceeding.

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[5] *See id.* at 736.

First, in *AT&T* v. *Iowa Utilities Board*, the Supreme Court vacated Rule 51.319 on an extremely narrow and technical ground, and the Court made it explicit that it had not remotely called into question the validity of a requirement that incumbent LECs make these seven elements available to any requesting carrier in the nation. Rather, the Court held only that the Commission had not made the two findings necessary to establish that incumbents' denial of access to each element of Rule 51.319 would impair a CLEC's ability to provide service and that the *First Report and Order* had not advanced any other rational basis for ordering this access.

The Court relied on the ground that several paragraphs of the *First Report and Order* had articulated a standard for determining the network elements that LECs had to make available that, in the Court's view, effectively meant that LECs were required to provide any requested element that "could be provided" and that § 251(d)(2) served no purpose. In particular, according to the Supreme Court, the *First Report and Order* had there erroneously stated that § 251(c)(3) required incumbent LECs to afford access to a requested network element if that was technically feasible, that § 252(d)(2) "merely permit[ted the Commission] to soften that obligation by regulatory grace" if the requesting carrier's ability to provide service would not be impaired without the element, and that the latter showing could never be made.[6]

At the same time, these errors would have been inconsequential if the *First Report and Order* had made valid findings that a CLEC's ability to provide service would in fact be impaired if any of the seven elements were unavailable from incumbents under the requirements

[6] *See id.*

of § 251(c)(3). But the Court held that the *First Report and Order's* "findings" of impairment had failed to give any "substance" to the terms of § 251(d)(2), for two separate reasons. First, the *First Report and Order* nominally focused only on capabilities within the LECs' networks and "blind[ed]" itself to whether the same elements were generally available through self-provisioning or other independent sources of supply at rates, terms, and conditions no less favorable than those applicable to LECs under § 251(c)(3).[7] Second, the Commission "assumed" that "*any* increase in cost . . . imposed by denial of a network element" would "*ipso facto*" impair a CLEC's "ability" to provide service. Thus, the *First Report and Order* did not acknowledge that there would be no impairment *if* a CLEC could anticipate a "handsome profit" without access to the element ("99% of investment") and if denial of the element would thus merely prevent the CLEC from anticipating "an even handsomer [profit]" ("100% of investment") without affecting the CLEC's "ability" to offer service.[8]

The Court did not remotely suggest that the Commission could not make the two missing findings or otherwise justify the requirements that incumbent LECs make available each of the elements prescribed in Rule 51.319. To the contrary, the Solicitor General had argued to the Supreme Court that the necessary findings had already implicitly been made in the *First Report and Order*, and the Supreme Court agreed that this order contained unchallenged findings and other statements "suggesting that the Commission's action might be supported by a higher

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[7] *See id.* at 735.

[8] *See id.*

standard."[9] However, because these findings were not expressly made and "no other standard [was] consistently applied," the Supreme Court said it "must assume that the Commission's expansive methodology governed throughout."[10] It thus concluded that the *First Report and Order* had not made sufficient findings of "necessity" and "impairment" and had not otherwise established a rational basis for Rule 51.319's requirements by "taking into account the objectives of the Act."[11]

Second, the necessary findings can be and should be made now. It is the case today – as it was in 1996 – that there are vast areas in the country in which CLECs generally cannot now obtain alternatives to any of the seven elements from sources other than incumbent LECs at all, much less on rates, terms, and conditions that are remotely comparable to those that the Act requires LECs to provide. Denial of access to any of these elements would prevent CLECs from providing services as broadly, effectively, or quickly as they could with the elements – satisfying the impairment and necessity tests alike. Indeed, as the Commission has recognized in its § 271 orders, CLECs cannot offer mass market services to residential and business customers today without access to the LECs' seven elements in combined form. And even after some individual carriers have upgraded cable televisions systems or established other alternate networks that serve residential and small business customers on competitive terms, access to network elements

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[9] *See id.* at 736.

[10] *See id.*

[11] *See id.*

will still be required for those CLECs to fill in gaps in their networks and for any other CLECs who wish to offer comparable service.

Further, today's local telephone markets also have the characteristics that, under the terms of the Supreme Court's decision, mean that "any increase" in cost resulting from restrictions on the availability of network elements would in fact impair CLECs' "ability" to provide service. In particular, in stark contrast to the hypothetical market conditions posited by the Supreme Court, there is no prospect that CLECs who want to use access to combinations of incumbent LECs' network elements to offer mass market services could today earn any economic profits if they were to incur higher costs by obtaining one or more of the elements outside the incumbents' networks. It patently is not the case that CLECs could then anticipate the "handsome profits" that would (as the Supreme Court held) mean that their ability to offer service would be unimpaired by the resulting increases in their costs.

Preliminarily, as explained by Professors Hubbard, Lehr, and Willig, even those CLECs who are granted access to combinations of the LECs' seven elements at cost-based rates inherently face cost disadvantages in competing with the incumbents, and inherently face the risk that LECs will price (or reprice) their exchange and exchange access services at levels that will preclude these CLECs from earning revenues to cover their out of pocket expenses, much less earn "handsome" profits. For even if there were no transactional or related costs, a user of LEC elements is to pay the same costs that the LEC incurs in using an element and make the same pro rata contributions to universal service support mechanisms. But a user of combinations of elements inherently faces costs and risks that the incumbent LECs do not – *e.g.*, higher

transaction and other costs resulting from the incumbent's incentive and ability to discriminate, higher marketing costs and lower margins due to the necessity of underpricing the incumbent, and risks that the incumbent will reprice (or price) its services at levels that cover its lower costs (plus the incumbent's costs of capital), but that a CLEC cannot match (or undercut) without losing money.

That is the reason that exclusive reliance on combinations of the incumbent monopolists' seven network elements has no attractiveness for a firm like AT&T as a long term strategy. Rather, AT&T will use combinations of all or some of these seven elements for one of three limited purposes: (i) as a transitional means of acquiring information and establishing a customer base in certain areas where AT&T plans to establish alternative facilities by upgrading cable TV facilities or otherwise, (ii) as a gap-filling measure in adjacent or other areas, or (iii) as a means of offering one stop shopping to some or all customers in markets where the incumbent LECs have implemented the competitive checklist.

More pertinent for present purposes, it is thus even clearer that a CLEC who wishes to provide service through access to combinations of the incumbent LECs' seven elements cannot anticipate "handsome" – or indeed any – profits if it is forced to incur higher cost (or provide a more limited or lower quality service) because it is required to obtain one or more elements through self-provisioning or sources other than the LECs. Because even firms who obtain all the LECs' elements at cost-based rates face competitive disadvantages, it is inherently the case that a CLEC will be impaired if the unavailability of an element from a LEC means the offering of services that are less attractive, narrower in scope, or more expensive to provide. The effect of

virtually any such cost and competitive disadvantages would be to cause the CLEC to decline offering competing service to some or even all of the customers it might otherwise attract by using LEC elements – as Professors Hubbard, Lehr, and Willig explain. The result would be to immunize the incumbent LEC from mass market or other broad based competition until alternative networks are constructed.

Indeed, in these industry conditions, any increase in the cost of service or decrease in its quality or scope that results from a LECs' denial of access would defeat the objectives of the Act, even if it were certain that CLECs would nonetheless enter on the same scale and at the same time. For the resulting increase in CLEC costs or diminution in service quality will cause them to charge higher rates for exchange and exchange access services than they otherwise would and to put less competitive pressure on the incumbent LECs and any supracompetitive or inefficient prices that the incumbent LECs charge – undermining the objectives of the Act and serving no conceivable statutory purpose. For this reason, the Commission could and should order LECs to provide access to elements even if it were the case (as it is not) that CLECs would be assured of "handsome profits" without this access and that the CLECs' ability to provide service would therefore not be "impaired." Section 251(d)(2) requires only that the Commission "consider" whether and to what extent CLECs would be impaired without access to a LEC element and even when the Commission determines they would not be, it remains free to "determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act."[12] Promoting the lowest possible prices for consumers and

[12] *See id.*

eroding the monopoly power of incumbent LECs patently constitutes a rational basis for ordering access.

Third, although the narrow error that the Supreme Court found in the *First Report and Order* can be readily corrected by reiterating findings that the Commission has explicitly or implicitly made in many prior orders, incumbent LECs have proposed a series of restrictions or other limitations on access to the seven network elements. They have further argued that adoption of these restrictions would advance the Act's objectives and are permitted or even required by the Supreme Court's decision. These claims are supported, ironically, not by the Opinion for the Court in *AT&T Corp.* v. *Iowa Utilities Board*, but by the LECs' characterizations of Justice Breyer's opinion concurring in part and dissenting in part.

The Commission obviously will consider these claims with great care. However, analysis of the LECs' contentions will quickly demonstrate that none has any substance. Indeed, they are attempts to impose additional entry barriers on CLECs that would both impede the development of the mass market competition that today is economically possible only through combinations of network elements and impair the future development of mass market alternatives to the LEC facilities for residential and business customers alike.

The LECs' principal claim is that the Commission should require or permit state commissions to make area-by-area, carrier-by-carrier, or customer-by-customer determinations of whether CLECs would be impaired without access to individual elements. This is, in the first instance, simply a request that the Commission now overrule the contrary determination in the *First Report and Order*, despite the fact it was not even challenged on appeal, and despite the

fact that the Commission's jurisdiction to adopt minimum national rules was explicitly affirmed by the Supreme Court. More fundamentally, as the Commission tentatively found in the *Notice*, there is no possible basis for such action. It would be contrary to law, for the text of § 251(d)(2) provides that it is this Commission, not the states, that is to consider whether an element satisfies the standards of necessary or impair. It would further be bad policy that would defeat the objectives of the Act. The reality is that permitting state by state litigation of such issues would radically increase the cost of using network elements, deny CLECs the "regulatory []certainty" and predictability that they require,[13] delay or altogether preclude the onset of mass market competition, and advance no other statutory purpose. In particular, if LECs could litigate these claims, they would impose immense litigation costs on new entrants, introduce uncertainty and risks of non-uniform practices, and assure even more delays in the implementation of rules that were adopted over the three years ago. The inevitable effect would be to increase the costs of using network elements, to cause some CLECs to abandon plans to use them, and to cause other CLECs to use them less broadly.[14]

Conversely, this case-by-case litigation would advance no statutory policy. As explained above, the availability of network elements will have no effect on any CLEC's incentives to deploy alternative facilities as soon it is technically and economically possible to do so at a cost

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[13] *See* Memorandum Opinion and Order, *In the Matter of the Public Utility Commission of Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 3460, 3506 (1997) ("*Texas Build-Out Preemption Order*").

[14] *See* Hubbard/Lehr/Willig Aff. ¶ 40; *see also id.* ¶¶ 19, 25.

that is at all close to the LECs' prices for network elements. To the contrary, permitting CLECs access to network elements will, if anything, accelerate the development of alternative networks, for it allows CLECs to acquire the direct experience and information about their prospects in this market through leasing facilities before building and owning their own. It further allows entrants to serve entire communities even if their alternative facilities reach only portions, thus accelerating entry through alternate facilities.

Similarly, the LECs argue that the Commission should treat § 251(d)(2) as codifying some version of the essential facilities doctrine of the antitrust laws or adopt standards that would preclude access to LEC network elements whenever it appears that reasonable alternatives to LEC facilities will develop in the next two or more years for some subclass of exchange and exchange access customers. These proposals misapply the law and are an affront to the 1996 Act. The essential facilities doctrine does not apply to circumstances in which the law seeks to eliminate an existing monopoly, and these proposals would immunize LECs from any competition for any customers for periods of years. They would also eliminate any duty to provide network elements in any area where there was some prospect that a duopoly of two carriers with their own separate networks would develop. But the reality is that the existence of a duopoly would not provide even remote assurance that prices for exchange and exchange access services would be reduced close to their real economic costs. That is why the 1996 Act does not codify the essential facilities doctrine and expressly authorizes the use of network

elements by any telecommunications provider for use in providing any telecommunications services.[15]

In this regard, it is ironic that the incumbents rely on Justice Breyer's separate opinion in *AT&T* v. *Iowa Utilities Board*, for that opinion would provide no support for the incumbents even if it were the Court's rather than a lone partial dissent. While Justice Breyer expressed harsh criticisms of a test of "unbundling" or "sharing" in which "competitors share every part of an incumbent's existing system, including, say, billing, advertising, sales staff, and work force," that is not an objection to Rule 51.319.[16] Indeed, Justice Breyer's opinion makes it explicit that those criticisms were addressed not to the elements identified in Rule 51.319, but only to the broad test articulated in the *First Report and Order* under which "whatever requested element can be provided must be provided."[17]

In particular, Justice Breyer's opinion correctly states that the "basic purpose" of the 1996 Act can be characterized as "seeking to bring about, without inordinate waste, greater local service competition both as an end in local markets and as a means towards more competition, and fair competition, in long-distance markets."[18] But these observations have no application to the network elements set forth in Rule 51.319. For under § 271, the unbundling of six of Rule 51.319's requirements is a statutory precondition to "more competition, and fair competition, in

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[15] *See* 47 U.S.C. § 251(c)(3).

[16] *See Iowa Utils. Bd.*, 119 S. Ct. at 754 (Breyer, J., concurring in part and dissenting in part).

[17] *See id.* at 735.

[18] *See id.* at 748 (Breyer, J., concurring in part and dissenting in part).

long-distance markets."[19] And access to the seventh of the requirements – operations support systems – is essential to nondiscriminatory access to the other elements (and is independently required by Rule 51.313(c)). The reality is that while it is unclear at this juncture whether access to these seven elements could be sufficient to achieving the statutory objective of "more competition, and fair competition, in long-distance services," there will be no possibility of those results if these seven elements are not made available by BOCs.

For the same reasons, the tests the LECs propose are antithetical to numerous prior Commission decisions in § 271 and other proceedings. For example, the Commission's decisions under Section 271 and its framework for reforming access charges each critically depend on the existence of widespread, immediate access to network elements at TELRIC-based rates. In particular, if the Commission were now to decide that access to network elements should be restricted and CLECs effectively precluded from generally providing exchange and exchange access competition in individual markets until the future date (if ever) when there are alternative facilities that can economically support broad scale entry, it would require at least two immediate changes in the Commission's rules and policies.

The first is that there then would have to be an identical multi-year hiatus before any Section 271 application could be granted. Otherwise BOCs would be able to foreclose local and long-distance competition during that interim period by becoming the only carriers able to offer ubiquitous one-stop shopping, contrary to the Commission's interpretation of § 271 in the *Qwest*

[19] *See* 47 U.S.C. § 271(c)(2)(B) (requiring statewide access to loop/NID, switching, transport, signaling and call-related data bases, directory services, and operator services).

orders and elsewhere. Indeed, because unbundled access to the seven elements specified in Rule 51.319 is a statutory prerequisite to long-distance relief, there would have to be a multi-year hiatus on such relief that lasts not merely until there is one alternative to the BOCs' facilities throughout a state, but until there are sufficient facilities-based alternatives to cause the BOC voluntarily to make legally binding commitments to offer each of the elements on an unbundled basis on the rates, terms, and conditions that would prevail in a competitive market..

The second is that the Commission would no longer be able to rely on network elements to bring access charges down closer to cost. Rather, until such time (if ever) as broad scale competition is provided by multiple carriers through alternatives to LEC facilities, the Commission would have to prescribe the maximum access rates that incumbents could charge and adopt other prescriptive measures that the Commission's *Access Charge Reform Order* rejected.

Fourth, the debates on the precise standard that the Commission should articulate are significant only for the future. They have no pertinence to the question whether the seven elements defined in Rule 51.319 should be readopted, for each of these elements satisfies any rational definition of necessary or impair in the conditions that prevail in the nation as a whole today. The reality is that there are today no remotely adequate substitutes for any of these elements outside the LECs' networks in vast areas of the nation.

As the *Notice* tentatively finds, that patently is the case for the local loop. Alternatives now exist only for some of the loops used by the largest of business customers in downtown areas. Similarly, for the reasons that the Commission found in its *Shared Transport Order*, there

is no remotely adequate substitute for shared transport and the switching and signaling elements that must also be purchased to use shared transport. While it is in some limited circumstances possible for some CLECs economically to purchase and use their own switches to serve some market segments, it is not economic for mass market services that otherwise depend on elements obtained from LECs. Hooking up such switches to the LEC loops and transport facilities and making them operational requires manual provisioning that cannot support mass market entry, and involves costs that are both radically higher than if combinations of switching and other network elements were obtained from incumbents, and that are themselves prohibitive for mass market entry. With respect to dedicated transport, the added time and expense of bringing alternatives to market would likewise impair any CLEC's ability to offer services and would preclude their use at certain customer volumes. And although operator services and the LEC's directory assistance facilities present a closer question, it is clear from Justice Breyer's opinion and the terms of § 271 alike that making them available advances the objectives of the Act. In all events, they should at least continue to be unbundled until incumbent LECs broadly deploy customized routing arrangements that are necessary in order for CLECs to use their own OS/DA platforms in conjunction with unbundled switching. Finally, as noted above, it is indisputable that nondiscriminatory access could not be provided to any of these elements if there were not also nondiscriminatory access to the incumbents' OSS, and this access is independently required by the provisions of Rule 51.313 that the courts have already upheld.

In this regard, as the example of the switch makes plain, it is not sufficient merely to examine each of these elements on a stand-alone basis and ask whether they could individually

be replaced with alternatives. While such an analysis would support access to each of the seven network elements identified in the *First Report and Order*, the analysis ultimately must also include an assessment of how the elements could and would be used to provide service. The reality is that each of these elements can be used only in combination with other elements leased from the LEC or provided by the CLEC. Thus, any assessment of "necessary" and "impair" must also focus on the "operational impediments" that affect whether and how competitive service can be provided.[20] It is immaterial, for example, whether CLECs can obtain switches from other sources if those switches cannot be efficiently connected to the incumbent LECs' unbundled loops.

Fifth and finally, the Commission should do more in this proceeding than merely reinstate Rule 51.319. It should ensure that LECs have no practical ability otherwise to frustrate or delay CLECs' efforts to use network elements. The Commission should readopt Rules 51.315(c)-(f), in whole or in substantial part, as well as its rules regarding superior quality interconnection and access. That is permissible because the Supreme Court rejected the legal ground on which the Eighth Circuit vacated these rules. Moreover, Rules 315(c)-(f) can be readopted even under the Eighth Circuit's rationale if the Commission finds (as indisputable evidence establishes) that incumbent LECs will not allow CLECs to enter LEC offices to combine elements of the LEC network.

[20] *See First Report and Order* ¶ 3.

The remainder of these comments will be divided into five parts. Part I explains the critical but transitional the role that network elements play under the Telecommunications Act of 1996 and under the Commission's implementing regulations.

Part II affirmatively demonstrates (i) that CLECs will be impaired in their ability to provide service (and will also satisfy the test of "necessity") if they cannot provide a service as quickly, as broadly, or as inexpensively if they are required to obtain an element outside the incumbent's network and (ii) that even if no "impairment" existed, the Commission can and should adopt a rule requiring access to network elements of the incumbent when that is the lowest cost method for the CLEC to provide service.

Part III refutes the LECs' contentions that the Supreme Court's decision either requires or permits other radical changes in the Commission's approach – in particular, that it requires state-by-state adjudication over the availability of network elements or codifies the essential facilities doctrine. The adoption of either such approach would be inconsistent with the terms and purposes of the Act and the Commission's prior § 271 and access charge decisions.

Part IV provides a factual record that demonstrates that each of the seven elements of Rule 51.319 satisfies any plausible definitions of the "necessary" and "impair" factors, for the effects of denial of access to any of them would be severe.

Part V discusses why the Commission should readopt Rules 51.315(c)-(f) either in whole or in substantial part, as well as its rules on superior quality access and interconnection.

DISCUSSION

I. NETWORK ELEMENTS PLAY A CRITICAL ROLE IN THE 1996 ACT AND THE COMMISSION'S IMPLEMENTING REGULATIONS.

The use of leased network elements plays a critical role under the Telecommunications Act of 1996 Act ("1996 Act") and the Commission's implementing regulations. Unless their availability or utility is artificially restricted, network elements will both provide consumers with genuine benefits of competition in the "near term" period that could last for years or more and enhance the incentives and ability of CLECs to establish alternative networks where and when that is technically and economically feasible.

Congress provided for entry through combinations of all or some of the elements of LEC networks based on a single fact which has been abundantly confirmed in the years since the 1996 Act was passed: the incumbents' local exchange networks were built through state franchises and funding provided by captive ratepayers, and they enjoy such tremendous economies of scale and scope that it could take years or decades for ubiquitous alternatives to these networks to be established. Indeed, while it was unclear in 1996 whether and when carriers could generally establish alternatives that could provide mass market services to entire communities, the one thing that was clear was that it could not happen quickly. As the Commission has explained, "Congress expressly recognized that construction of redundant networks would be very costly and time-consuming, and therefore provided requesting carriers with the right to obtain non-discriminatory access to unbundled network elements. . . ."[21] In this regard, although AT&T and

[21] *See Texas Build-Out Preemption Order*, 13 FCC Rcd. at 3498.

others are making multi-billion dollar investments to provide broad-based services to areas that reach substantial numbers of the nation's homes and businesses, no such networks have been put into operation since the 1996 Act was passed, *despite* the reality that incumbents have thus far succeeded in blocking the combinations of elements that represent the only other vehicle for broad-based entry.

Further, even after an alternative network is built in a community, Congress recognized that it would be unlikely that a new entrant would have the capacity required to satisfy the demand for service in an entire area. Congress similarly recognized that the existence of two facilities networks would not create the kinds of competitive benefits for consumers that exist in today's long distance, wireless, equipment, or other telecommunications markets, where multiple firms compete and prices and quality are driven to competitive levels.

Congress understood that until there can be broad based alternative networks, network elements would be the only possible form of competition in exchange and exchange access services. The only other form of competition that is feasible during these periods is the service resale authorized by § 251(c)(4), which cannot remotely provide the same competitive benefits. Resale does not allow entry into the entire local telephone market, for resale can be used only to provide exchange services and not exchange access. It further places no competitive constraints on incumbents and no downward pressure on their retail prices. Indeed, customers lost to resale have no effect whatsoever on the LECs' monopoly profits, because the Act's "avoided cost" resale pricing methodology assures that the LECs' profits margins will be unchanged regardless of whether a customer switches to a reseller or stays with the incumbent.